K. MUTHULAGU (ON BEHALF OF HIMSELF AND 91 ORS. SEEKING THE SAME REMEDIES)

v.

LEMBAGA PELABUHAN KLANG

HIGH COURT MALAYA, SHAH ALAM
DATO' JAMES FOONG J
[SUIT NO. 22-159-90]
14 AUGUST 1995

PRACTICE & PROCEDURE: *Class action - Declarations sought - Preliminary objections - Representative capacity of plaintiff not endorsed in writ - Whether fatal - Whether objection raised within reasonable time - Order 2 r. 2(1) RHC - Death of several claimants - Whether proceedings nullified.*

EMPLOYMENT LAW: *Class action - Takeover of company employing plaintiff - Almost all staff including plaintiff hired by defendants - Dispute - When retirement benefits to be computed - Whether claimants qualify for pension scheme - Whether computation to be from date of hiring by defendants or backdated to date of joining previous company - Whether there was a break in the plaintiff's period of service.*

COMPANY LAW: *Class action - Dispute on qualification for retirement benefits - Takeover by defendants of company employing plaintiff - Defendants a statutory body holding 98% shares in the company - Whether company a separate legal entity from defendants - Whether the corporate veil should be lifted.*

CHC was a company incorporated in 1953 to supply tally clerks, labourers and stevedores to Port Klang (then Port Swettenham) (the Port). Its main shareholders were the Malayan Railway. In 1963, the defendants, a statutory body, was created by the Port Authority Act with one of its purposes being to take over the operations of the Port. Thereby the defendants became 98% shareholders of CHC with the other 2% held by nominees, board members or staff of the defendants. Early 1973, the defendants stopped issuing a licence to CHC to supply workers for the Port and employed their own staff to run the operations. They absorbed most of CHC's staff as employees with offers being made to successful applicants after the requisite medical examination. The plaintiff was informed of his termination by CHC on 2 April 1973 and was given confirmation of employment with the defendants on 24 April 1973. 1 May 1973 was recorded as the date of engagement by the defendants. The plaintiff retired on 15 September 1985 and was given retirement benefits calculated from 1 May 1973.

The plaintiff brought a class action on behalf of himself and 91 others seeking declarations *inter alia* that the defendants had breached the employment agreement in refusing to take into consideration the plaintiff's services with CHC as continuous for the purpose of computing gratuity and pension and that the defendants do pay the said benefits computed from the date the plaintiff joined the services of CHC on the basis that the CHC was at all material times a subsidiary of the defendants.

The defendants argued that as a statutory body they were bound by the method of payment of benefits set out by the Statutory and Local Authorities Pension Act 1980 (S & L Pension Act) and that the plaintiff and others of his class had only entered into their employment on 1 May 1973. The defendants also raised several preliminary objections. Firstly, that the plaintiff had failed to endorse in the writ that he was suing in a representative capacity in accordance

with O. 6 r. 3(1)(e) of the Rules of the High Court (RHC). Secondly, that some of the persons represented by the plaintiff were not emplaced on the pension scheme as they had not fulfilled the period of reckonable service based on the time commencing 1 May 1973. Thirdly, that some of the persons represented by the plaintiff were dead.

Held:

[1] The non-endorsement on the writ, ought not be fatal as to nullify the proceeding as it is only an irregularity, and can be accepted under O. 2 r. 1(2) RHC. Further, O. 2 r. 2(1) RHC requires applications to set aside any proceedings based on irregularity to be made within a reasonable time. In this instance the objection was only raised when the parties had closed their case which is very late in the day to raise such a matter.

[2] The very issue of this case is based on 1 May 1973 as the date of calculation, in which the plaintiff alleged should be extended to the time he was with CHC. If this Court should rule that such a proposition is the correct position in law, then all these objected persons may be emplaced persons under the pension scheme. For this reason, this Court is of the view that this objection is premature.

[3] The fact that some of the persons represented by the plaintiff may be dead should not nullify the proceedings, for the plaintiff is alive and is still able to represent those who are alive.

[4] There is no need to lift the corporate veil as full particulars of CHC have already been revealed. CHC is or was incorporated under the Companies Ordinance, a predecessor of the present Companies Act, and it functioned and operated through its board of directors and employed staff. Though some of these directors were also members or employees of the defendants, CHC stands distinctly on its own as a legal entity. Being a separate entity, any person who was engaged by CHC must have been an employee of CHC and not otherwise.

[5] As the plaintiff's employment with CHC was duly terminated before he entered into service with the defendants on 1 May 1973, there can be no implication that the plaintiff's employment continued from CHC to the defendants. With the defendants being a separate entity from CHC, computation of gratuity and pension can only be based on the time when the plaintiff entered into employment with the defendants on 1 May 1973. Furthermore, the S & L Pension Act specifies that it is only applicable to an "employee" under the Act and s. 2 of the Act defines "employee" to mean a person on full time employment with a statutory body or local authority which precludes the plaintiff prior to 1 May 1973. As such, the plaintiff does not qualify to have his claim for pension calculated beyond 1 May 1973.

[Plaintiff's claim dismissed with costs].

Cases referred to:
Bowler v. John Mowlem & Co. Ltd. [1954] 3 All ER 557 ***(dist)***
Loh Koon Moy v. Zaibun Sa bte Syed Ahmad [1978] 2 MLJ 29 ***(foll)***
Duke of Bedford v. Ellis [1901] AC 11 ***(refd)***

Legislation referred to:
Port Authority Act
Rules of the High Court O. 2 r. 2(1), (2), O. 6 r. 3 (1)(e)
Statutory and Local Authorities Pension Act 1980, s. 2

Other source referred to:
Supreme Court Practice 1991, Volume 1 (the White Book), para. 6/3 p. 47

For the plaintiff - G. Proctor; M/s. YS Woo & Proctor
For the defendant - Jyotsana Doshi; M/s. Abdullah & Zainuddin

JUDGMENT

James Foong J:

The plaintiff is bringing a representative's action on behalf of himself and others whose names are as annexed to the statement of claim against the defendants for the following orders;

(1) a declaration that Cargo Handling Corporation (CHC) was a wholly owned subsidiary of the defendants;

(2) a declaration that the defendants have breached the terms of the agreement in refusing to take into consideration the plaintiffs' services with CHC as a continuous service for purposes of computing gratuity and pension;

(3) a declaration that the defendants are obliged in law to adhere to the principles of industrial law as enumerated and practised in Malaysia;

(4) a declaration to the effect that for all material purposes CHC was a statutory body;

(5) an order that the defendants do pay gratuity and pension computed from the date when the plaintiff joined the service of CHC;

(6) damages;

(7) interest;

(8) and cost.

Substantial facts of this case are not disputed and they are as follows. CHC is or was a private limited company incorporated in this country in 1953. One of its main objectives was to supply tally clerks, labourers and stevedores to Port Klang which was then known as Port Swettenham. Its main shareholders were then Malayan Railway which were the operators of Port Swettenham. In 1963, by virtue of the Port Authority Act the defendants were created as a statutory body, with one of its purposes being to take over from Malayan Railway the operations of Port Swettenham. By this exercise the defendants became owners of 98% of the shares issued by CHC. The other 2% issued shares were held by nominee shareholders who were either a board member of the defendants or a staff employee of the defendants.

The plaintiff personally joined CHC as an employee on 30 December 1953. In the early part of 1973, the defendants decided not to issue a licence to CHC for the supply of tally clerks, labourers and stevedores for the defendants' operation in Port Swettenham. The name of this port was by then changed to Port Klang. They wished to employ their own staff to run this operation. In order to do so, they absorbed almost all the staff of CHC to be their employees. The procedure adopted was for the employees of CHC to apply for jobs in the defendants. The defendants would then offer positions to the successful applicants after satisfactory medical examinations on the candidates. These new employees of defendants were then given circulars informing them that they were bound by certain directions governing

statutory bodies. One of these relates to gratuity and pension benefits upon retirement. 1 May 1973 was recorded as the date when most of these employees were engaged by the defendants; this included the plaintiff. After the plaintiff had left the employment of CHC he received a certain sum of money as gratuity payments from CHC.

The plaintiff personally retired from the defendants on 15 September 1985 upon attaining the age of 55 years. By virtue of the Statutory and Local Authorities Pension Act 1980 (S & L Pension Act), the plaintiff having completed not less than 10 years of reckonable service and being a confirmed employee of the defendants, was given gratuity and pension computed from 1 May 1973, the date he was accepted into the defendants' employment. This is where the dispute arose. The plaintiff and those of his class action claim that the date of such computation should begin from the time they joined CHC and should not be based on 1 May 1973. This is for reason that CHC was at all material times a subsidiary of the defendants, and there was no break in the plaintiff's service of employment from CHC into the defendants.

The defendants on the other hand, *inter alia* argued that they are a statutory body, and as such, are bound by the mode or method of payments of gratuity and pension as set out in S & L Pension Act. They also claimed that the plaintiff and those of his class only entered into their employment on 1 May 1973.

In the written submission of the defendants some preliminary issues were raised relating to non-compliance of the High Court Rules (HCR) by the plaintiff, and to the entitlement of the plaintiff to qualify in bringing a representative's action.

The first objection of the defendants is that of the non-endorsement in the writ to state that the plaintiff is suing in a representative capacity in accordance with O. 6 r. 3 (1)(e) HCR. In support of this contention, the defendants' Counsel quoted paragraph 6/3 at page 47 of the *Supreme Court Practice 1991*, Volume 1 (the White Book), which states that "the endorsement on the writ that is (the) crucial matter and not the statement in the title which is a mere description." Thus failure to endorse on the writ should nullify the writ even though there is a description of representative capacity after the name of the plaintiff.

The defendants' Counsel though acknowledging this omission submitted that such an oversight is not fatal, since proper description of the plaintiff's representative capacity is also described in the statement of claim besides appearing on the title.

A careful perusal of the quoted passage in the White Book reveals the supporting authority of *Bowler v. John Mowlem & Co. Ltd.* [1954] 3 All ER 557. In that case, the widow of the deceased who died as a result of an industrial accident issued a writ against the defendants with the title, "Between Winifred Bowler (administratrix of Thomas Henry Bowler deceased)." There was no endorsement of the plaintiff's representative capacity in the writ nor was this found in the statement of claim. The Court of Appeal ruled against the plaintiff, but the main reason for this decision was that the plaintiff at the date of the issue of the writ was not the administratrix of the deceased's estate as described, since the grant of letters of administration had not been granted to her when the writ was issued. She had therefore no legal capacity to fit the description. However, in our present case the plaintiff personally and those he represents are in full legal capacity to bring an action against the defendants. They share a common interest, a common grievance and a common remedy that is beneficial to all. The non-endorsement on the writ, in the opinion of this Court, ought not be fatal as to nullify the proceeding. It is only an irregularity, and can be accepted under O. 2 r. 1(2) HCR, similar to that as expressed in the judgment of Chang Min Tat SCJ in *Loh Koon Moy v. Zaibun Sa*

bte Syed Ahmad [1978] 2 MLJ 29, where the circumstances are virtually similar. Further, it would be pertinent to point out that O. 2 r. 2 (1) HCR requires application to set aside any proceedings based on irregularity to be made within a reasonable time. In this instance, this objection was only raised in the submission of the defendants when testimonies from both the plaintiff's and the defendants' witnesses had been taken, and the parties had closed their case. This, certainly is very late in the day to raise such a matter.

The second objection of the defendants relates to some of the persons whom the plaintiff represents not being emplaced on the pensionable scheme under the S & L Pension Act. As stated earlier, in order to qualify for pension under this Act, the person must have completed 10 years of reckonable service (which has been subsequently changed to 3 years by a 1992 amendment act), and being confirmed in his appointment. Whether one qualifies within the 10 years of reckonable service must obviously depend on when calculation begins. The defendants alleged that some of these persons whom the plaintiff represents have not fulfilled the period of reckonable service based on the time commencing from 1 May 1973. This, however, puzzles this Court because the very issue of this case is based on this date of calculation, in which the plaintiff alleged should be extended before this date to the time he was with CHC. If this Court should rule that such a proposition is the correct position in law, then all these objected persons may be emplaced persons under the pensionable scheme. For this reason, this Court is of the view that this objection is premature.

The third objection of the defendants is that some of the persons whom the plaintiff represents are dead. Such occurrence should not nullify these proceedings, for the plaintiff is still alive and he still can continue to represent those who are alive. As set out by Lord Macnaghten in *Duke of Bedford v. Ellis* [1901] AC 11, the classic case on representative's actions, the main qualification for such action is that the parties must constitute a defined class, though it is immaterial that it is fluctuating.

Returning to the main issue, the plaintiff's Counsel has strenuously requested this Court to lift the corporate veil of CHC, in order to determine who were the alter ego of this company. From the evidence tendered, there is no necessity for such a move. Full particulars of CHC have already been revealed, and the defendants have never denied that they did own 98% of her shareholdings, with the balance held by a member of the defendants or a staff under their employment. But does this make the plaintiff and all those he represents employees of the defendants during their time of service with CHC? The answer is in the negative, for CHC is and was a separate entity from that of the defendants. CHC is or was incorporated under the Companies Ordinance, a predecessor of the present day Companies Act, and it functioned and operated through its board of directors and employed staff. Though some of these directors were also members or employees of the defendants, one cannot escape from the legal distinction that CHC stands distinctly on its own as a legal entity. Similarly, this applies to the defendants who are a creation of statute. Being a separate entity, any person who was engaged by CHC must have been an employee of CHC and not otherwise. He could not have been an employee of the defendants for the defendants have never engaged him. All the defendants have with CHC is ownership of shares in this company, and as shareholders, they derived income from CHC through share dividends of CHC. They may also have some common directors with CHC, but this does not mean that under law both these bodies are the same.

The plaintiff has confirmed that he was an employee of CHC, and from evidence tendered his salary was paid by CHC. On 2 April 1973, CHC informed the plaintiff of his termination of service - exhibit D30. There was then an offer by the defendants for employment with the

defendants - exhibit P12. In response the plaintiff applied for a position as shown in exhibit P13. This was followed by a medical examination of the plaintiff as can be seen through exhibit P14 and P15. The plaintiff was then confirmed in his employment with the defendants by way of a letter dated 26 April 1973 - exhibit P16. The plaintiff then accepted to be complied by the defendants' service regulations - exhibit P22. To complete this picture, the plaintiff also received and accepted from CHC retirement gratuity amounting to RM4,174.59 - exhibit P17. All these lead to only one conclusion, and that is, the plaintiff's employment with CHC was duly terminated before he entered into the service of the defendants on 1 May 1973. There can be no implication that the plaintiff's employment continued from CHC to the defendants. With the defendants being a separate entity from CHC, computation of gratuity and pension can only be based on the time when the plaintiff entered into employment with the defendants, and from evidence, this clearly indicates 1 May 1973.

The S & L Pension Act clearly specified that it is only applicable to "employee" under this Act. "Employee" under s. 2 of this Act means a person on full time employment with a statutory body or local authority. The plaintiff was not such an employee before 1 May 1973, and as such, does not qualify to have his claim for pension calculated beyond 1 May 1973. To declare otherwise as prayed for by the plaintiffs under prayer (5) would be tantamount to not only going against the law, but to make laws which are strictly not within the framework of the judiciary; this area should be best left to the legislature.

Accordingly, this Court hereby dismisses prayers (1), (2), (3), (4), (5), (6), (7) and (8) of the plaintiff's claim with cost to be awarded to the defendants.